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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

INTEL CORPORATION, APPLE INC.,

Plaintiffs,

v.

FORTRESS INVESTMENT GROUP LLC, FORTRESS CREDIT CO. LLC, UNILOC 2017 LLC, UNILOC USA, INC., UNILOC LUXEMBOURG S.A.R.L., VLSI TECHNOLOGY LLC, INVT SPE LLC, INVENTERGY GLOBAL, INC., DSS TECHNOLOGY MANAGEMENT, INC., IXI IP, LLC, and SEVEN NETWORKS, LLC,

Defendants.

Case No. 3:19-cv-07651-EMC

PLAINTIFFS' RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES

Judge: Hon. Edward M. Chen

Date: June 18, 2020

Time: 1:30 p.m.

I. INTRODUCTION

Plaintiffs respectfully submit this response to the Statement of Interest of the United States (the "Statement"). The Statement largely echoes Defendants' Motion to Dismiss, to which Plaintiffs respond in detail in their Opposition Memoranda. The Statement is the latest in the Justice Department's (the "Department") expanded amicus program through which the Department increasingly files amicus briefs in district courts, courts of appeals, and the Supreme Court.[1] It is also the latest example of the Department opposing private antitrust actions having some connection to intellectual property.[2] The Department's opposition here, however, advocates a position that contradicts what the Department has advocated previously. Specifically, the Statement's position that market definition is required for Section 7 claims—yet not for Section 1 claims—is the opposite of the Department's prior position on that issue. The Statement also reflects an internal inconsistency. Namely, the Statement's argument that the conduct Plaintiffs challenge is cognizable only under Section 2 of the Sherman Act ignores a distinction—that Plaintiffs challenge the aggregation of patents, not the assertion of patents—that the Department itself recognizes in the Statement's *Noerr-Pennington* discussion. For the reasons in Plaintiffs' Opposition Memoranda and here, the Court should reject the Department's arguments in support of Defendants' motion to dismiss.

II. ARGUMENT

The Department's argument that market definition is required for Section 7 claims—yet not for Section 1 claims—contradicts the Department's previously held position on the issue.

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[1] *See* Antitrust Division Update Spring 2019, U.S. Dep't of Justice, https://www.justice.gov/atr/division-operations/division-update-spring-2019/antitrust-division-s-competition-advocacy (last updated Mar. 28, 2019).

[2] *See, e.g.*, Motion for Leave to File Statement of Interest, *Con't Auto. Sys., Inc. v. Avanci, LLC*, No. 3:19-CV-02933-M (N.D. Tex. Feb. 27, 2020); Statement of Interest of the United States; *Lenovo (United States) Inc. v. IPCOM GMBH & CO., KG*, No. 5:19-CV-01389-EJD (N.D. Cal. Oct. 25, 2019); Notice of Intent to File a Statement of Interest of the United States of America, *U-Blox AG v. Interdigital, Inc.*, No. 3:19-CV-0001-CAB (BLM) (S.D. Cal. Jan. 11, 2019).

See Statement at 5-7 & 6 n.5.[3] The Department explained to a court in this District that "[m]arket definition and market share are . . . not a necessary predicate to antitrust liability under Section 1 of the Sherman Act," and "[t]he rule should be no different under Section 7 of the Clayton Act." Plaintiffs' Trial Brief at 8, *United States v. Oracle Corp.*, No. 3:04-CV-00807-VRW (N.D. Cal. June 1, 2004). The Department pointed out that "[b]ecause Section 7 deals with likely future effects of a transaction ('may substantially lessen'), rather than with current effects of challenged conduct, it is often necessary to infer those effects from market structure." *Id.* But "[i]n merger analysis, the ultimate question is always about the creation or enhancement of market power." *Id.*; *see also* Plaintiffs' Response to Defendant's Partial Motion to Dismiss Or, In the Alternative, for a More Definite Statement at 4, *United States v. Dean Foods Co.*, No. 2:10-CV-00059-JPS (E.D. Wis. Mar. 11, 2010) (explaining in a Section 7 case that "[m]arket definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether [market] power exists." (quoting *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987))).

The Department's position in this matter also conflicts with its current public guidance on mergers. According to the Department's and the Federal Trade Commission's Horizontal Merger Guidelines, merger analysis "need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis." *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010). "[M]arket definition allows the Agencies to identify market participants and measure market shares and market concentration." *Id.* Yet "[t]he measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects." *Id.*

[3] In any event, as explained in their Memorandum of Points and Authorities in Opposition to Defendants' Joint Motion to Dismiss, Plaintiffs have sufficiently alleged the Electronics Patents Market. *See* Plaintiffs' Mem. at 21.

The Statement's inconsistency is not limited to the Department's Section 7 argument. The Statement is internally inconsistent in its argument that the conduct Plaintiffs challenge is cognizable only under Section 2 of the Sherman Act rather than under Section 1 or Section 7. *See* Statement at 16-17. This conclusion relies on a faulty premise—that Plaintiffs challenge "Fortress's unilateral action (namely, the alleged prodigious litigation activity it carried out or directed) following the aggregation of the patents." *Id.* But as the Complaint makes clear, the conduct Plaintiffs challenge is not "prodigious litigation activity" but rather Defendants' aggregation of patents. *See, e.g.*, Compl. ¶¶ 35-50 (describing the anticompetitive effects of Defendants' patent aggregation).

The Department itself recognizes this distinction—between unlawful patent aggregation and subsequent litigation to profit from that aggregation—when it explains elsewhere in the Statement that *Noerr-Pennington* immunity should not apply here. *See* Statement at 18-19. "[E]ven if wholly post-acquisition conduct (such as litigation) is protected by the *Noerr-Pennington* doctrine, the doctrine does not bar liability where the acquisition itself of patents lessens competition." *Id.* at 18 (footnote omitted). Harming competition through patent acquisitions, the Department points out, "remains subject to the antitrust laws even if there is subsequent litigation to enforce the patents." *Id.* at 19. It is precisely that distinction that makes clear why Plaintiffs' claims are cognizable under Section 1 and Section 7: Plaintiffs challenge Defendants' agreements that aggregate patents, not "unilateral action . . . following the aggregation of patents."[4] *Id.* at 16.

III. CONCLUSION

The Court should reject the Department's arguments in support of Defendants' motion to dismiss.

[4] That some aspects of Fortress's conduct may also be actionable as unilateral conduct does not mean that properly pleaded violations of Section 1 or Section 7 should not be allowed to proceed.

DATED: April 13, 2020

Respectfully submitted,

By: */s/ Mark D. Selwyn*

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